Nos. 80-639 and 80-651

In the Supreme Court of the United States

OCTOBER TERM, 1980

BERNARD SULLIVAN, PETITIONER

v.

PERINI NORTH RIVER ASSOCIATES, ET AL.

RONALD FUSCO, PETITIONER

v.

PERINI NORTH RIVER ASSOCIATES, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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* Other respondents in the court of appeals were the Hartford Accident & Indemnity Co. and the Director, Office of Workers' Compensation Programs, United States Department of Labor. See 33 U.S.C. 921a; Fed. R. App. P. 15(a); 20 C.F.R. 802.410(b). The Director also filed his own petition for review in the court of appeals. No. 79-4016 (2d Cir.). The court of appeals dismissed that petition for lack of standing (Pet. App. A-5, A-30 to A-31). The Director's petition for rehearing was denied on December 17, 1980.

QUESTION PRESENTED

Whether marine construction workers building a foundation for a sewage treatment plant on the Hudson River are persons "engaged in maritime employment," within the meaning of Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act.

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OPINIONS BELOW

The original opinion of the court of appeals (Pet. App. A-9 to A-31)[1] is reported at 601 F.2d 659. The opinion of the court of appeals on remand (Pet. App. A-1 to A-7) is reported at 622 F.2d 1111. The opinion of the Benefits Review Board (Pet. App. A-36 to A-86) is reported at 9 B.R.B.S. 378. The decisions and orders of the administrative law judges (Pet. App. A-87 to A-95; A-96 to A-102) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1980. On August 19, 1980, the court of appeals denied a petition for rehearing filed by petitioner Sullivan. The petition for a writ of certiorari in No. 80-639 was filed on October 20, 1980. The petition in No. 80-651 was filed on October 17, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 902(3), provides in pertinent part:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker * * *.

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[1] "Pet. App." refers to the appendix to the petition in No. 80-651.

Section 3(a) of the Act, 33 U.S.C. 903(a), provides in pertinent part:

> Compensation shall be payable under this Act in respect of disability or death of an employee but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). * * *

STATEMENT

1. Petitioners, employees of respondent Perini North River Associates, were injured in separate job-related accidents at the site of the North River Pollution Control Project, a sewage treatment plant under construction on the Hudson River in New York City (Pet. App. A-11). Perini had contracted with the city to build the concrete substructure for the plant (*ibid.*).

The substructure extends approximately 700 feet from the shoreline into the Hudson River (Pet. App. A-11 to A-12) and runs along the length of the river for 2000 feet between West 133rd and West 148th Streets (*id.* at A-11, A-89). The construction contract required Perini to "place 2,300 hollow circular pipes, called caissons, in navigable waters down to imbedded rock, to fill the caissons with concrete, to connect them together at proper elevations above the water with concrete beams, and to place precast concrete slabs on top of the beams" (*id.* at A-12). The sewage treatment plant was to be constructed on this foundation under a separate contract for which bids were to be taken at a later date.

Petitioner Ronald Fusco was employed as a construction laborer (Pet. App. A-41). He "worked on floating stages and assisted the dock builders in the construction of the substructure" (*ibid.*). Fusco performed such tasks as "fetching materials from barges or from the shore, assisting in the driving of caissons into the river bed, pouring concrete into the caissons, fabricating wood forms for the pouring of concrete beams across the caissons and helping to construct platforms across those beams" (*id.* at A-89). He and his fellow employees frequently wore life jackets on the job because of the risk of falling into the river (*ibid.*).

On January 8, 1975, Fusco was injured in the course of his employment. As he descended a ladder that was leaning against a concrete form, the ladder twisted, throwing him against the form and causing him to fall (Pet. App. A-12, A-42, A-89; 80-651 Pet. 13-14). As Fusco fell from the ladder, he apparently struck the left side of his head against the side of the concrete form (*id.* at A-12, A-90). At the time of Fusco's injury, he was approximately 200 feet from shore.

Petitioner Bernard Sullivan was employed as a wire lather (Pet. App. A-41). In that capacity, he "performed a variety of tasks involving the steel reinforcement of the concrete beams and caissons for the substructure" (*ibid.*). In particular, Sullivan was "directly involved" in "the building and filling of caissons (large cylinders sunk upright into the water) into which steel re-enforcing rods were inserted before the caissons were filled with concrete" and in "re-enforcing horizontal beams hanging over the water from caisson to caisson" (*id.* at A-99). When they worked on these horizontal concrete beams

at high tide, Sullivan and other lathers were frequently standing in the water (*ibid.*). Two or three times a week, Sullivan and other lathers went aboard barges to unload steel rods or to prepare the rods to be moved by cranes aboard the barges (*ibid.*).

On September 11, 1975, Sullivan was injured in the course of his employment. He apparently sustained an injury to his lower back as he helped to pass a 30-foot steel rod into a connecting beam to reinforce it (80-639 Pet. 13). At the time of the accident, Sullivan was working "about 150 feet from the shore and was standing about 12 inches above the water" (Pet. App. A-99).

2. Petitioners filed claims for compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* Respondent Perini and its insurance carrier, respondent Hartford Accident & Indemnity Co., disputed the claims, asserting, *inter alia*, that the claimants were not "engaged in maritime employment," within the meaning of Section 2(3) of the Act, and were therefore not covered by the Act. The cases were referred to the Office of Administrative Law Judges for formal hearings. In separate proceedings, two administrative law judges reached opposite conclusions. One judge determined that Fusco was engaged in maritime employment and, on that basis, awarded compensation under the Act (Pet. App. A-87 to A-95). The other judge ruled that Sullivan was not engaged in maritime employment and, accordingly, rejected his claim (*id.* at A-96 to A-102).

In each case, the losing party appealed to the Benefits Review Board under 33 U.S.C. 921(b). The Board consolidated the appeals with the appeals in two other cases involving Perini employees. In a divided

decision (Pet. App. A-36 to A-86), the Board held that the claimants were not engaged in maritime employment because their construction jobs did not have "a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters" (*id.* at A-49). Departing from its own precedents,[2] the Board explicitly abandoned the proposition that, "if an employee was covered under the Act prior to the 1972 Amendments, the employee would similarly be covered after the amendments" (*id.* at A-51).

3. Petitioners and the Director, Office of Workers' Compensation Programs, sought judicial review of the Board's decision under 33 U.S.C. 921(c). The court of appeals reversed, holding that Fusco and Sullivan were covered by the Act (Pet. App. A-9 to A-31). The court concluded that petitioners would have been covered by the Act before the 1972 amendments and that Congress, when it amended the statute, did not intend to withdraw coverage from any workers previously covered. The court stated (Pet. App. A-22; emphasis in original):

> *Congress took it for granted that injuries occurring upon water were covered and would remain covered. There was no indication that Congress considered withdrawing existing coverage or eligibility.*

The court also stated that it interpreted the statutory phrase "person engaged in maritime employment" to include "any person whose principal duties are performed on navigable waters as that term was under-

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[2] See, *e.g.*, *Stewart* v. *Brown & Root, Inc.*, 7 B.R.B.S. 356 (1978), aff'd, 607 F.2d 1087 (4th Cir. 1979), cert. denied, No. 79-1136 (June 2, 1980).

stood before 1972" (Pet. App. A-29). The opinion of the court of appeals thus intertwined two separate rationales in support of the conclusion that petitioners were "engaged in maritime employment" at the time of their injuries. The first focused on the place at which the injuries occurred, and the second concentrated on the location where petitioners' "principal duties" were performed. The geographic factor was predominant in both strains of the court's opinion.

In dictum, the court further concluded that this geographical focus is the *only* proper one under the Act and that the phrase "person[s] engaged in maritime employment" in Section 2(3) refers *only* to persons whose principal duties are performed on actual navigable waters or who are injured on such waters (Pet. App. A-29). The court believed that Congress listed longshoremen, harborworkers, ship repairmen, shipbuilders, and shipbreakers in Section 2(3), not as examples of persons engaged in maritime employment, but as additional persons covered by the Act whether or not engaged in maritime employment. The court clarified and emphasized this construction of Section 2(3) in another case decided the same day, *Walter Tantzen, Inc.* v. *Shaughnessy*, 601 F.2d 670 (2d Cir. 1979), vacated and remanded, 446 U.S. 905 (1980), rev'd on remand, 624 F.2d 5.

Respondents Perini and Hartford petitioned for a writ of certiorari. Apparently because of the inconsistency between the court of appeals' interpretation of Section 2(3) and the subsequent decision of this Court in *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69 (1979), the Court vacated the judgment of the court of appeals and remanded for further consideration in light of *Ford*. See 444 U.S. 1028 (1980) (Pet. App. A-8).

On remand, the court of appeals reversed its original decision and held that Fusco and Sullivan were not engaged in maritime employment when they were injured because their activities did not "bear a significant relationship to navigation or to commerce on navigable waters" (Pet. App. A-4). The court explained (*id.* at A-5):

> In the cases at bar the claimants' activities had nothing significant to do with navigation or with commerce on navigable waters. They were engaged exclusively in constructing a sewage disposal plant. * * * The only sense in which the claimants' activities were maritime was in the sense of their locus. To base a decision upon the locus of work is to found it upon a geographic concept—a foundation precluded by the reasoning in the Ford case.

DISCUSSION

The court of appeals' decision is incorrect for at least two, and probably three, reasons. Moreover, at least some of the legal issues implicated in the decision below are sufficiently important to merit the attention of this Court. Nevertheless, for a variety of reasons, we believe that this case does not present an appropriate occasion for the Court to undertake review of the significant unresolved questions raised under the Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972.

1. The first, and perhaps most egregious, error of the court of appeals is its rejection of the proposition that an employee whose principal duties are performed over the actual navigable waters of the United States is, by virtue of that fact alone, "engaged in maritime employment" within the mean-

ing of Section 2(3) of the amended Act. Although, as we discuss at pages 18-19, *infra*, the record leaves some uncertainty regarding petitioners' precise location at the time they were injured, there appears to be no dispute that the court of appeals was correct in its initial opinion when it observed that each petitioner "performed his principal duties upon navigable waters as that term was defined in § 3(a) of the original 1927 LHWCA" (Pet. App. A-30).

We submit that any employee who performs his principal duties over actual navigable waters (*i.e.*, "wet waters" or "pre-1972 waters") is, for that reason alone, "engaged in maritime employment" under Section 2(3) of the amended Act and thus satisfies the so-called "status" test for coverage under the Act.[3] The explanation for this view is essentially the same as the explanation for the original enactment of the statute in 1927.

In *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917), this Court held that the states could not constitutionally apply their workmen's compensation remedies to maritime injuries occurring on the navigable waters of the United States. Subsequently, the Court invalidated congressional efforts to delegate to the states the necessary authority to provide compensation for such injuries. *Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149 (1920); *Washington* v. *W.C. Dawson & Co.*, 264 U.S. 219 (1924). In response to these decisions, Congress enacted the LHWCA to provide a federal compensation remedy for injured

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[3] Coverage under the Act is, of course, subject to the statutory exclusions in Section 2(3) for "a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net."

marine workers arguably excluded from state coverage by *Jensen*. See generally *Sun Ship, Inc.* v. *Pennsylvania*, No. 79-343 (June 23, 1980), slip op. 2-4.

Persons who perform their principal duties over actual navigable waters are precisely the kind of employees Congress had in mind when it enacted the LHWCA. They were the persons who most needed the protection of a federal compensation remedy because most of their work was performed at a place that, under *Jensen*, could not be reached by state workmen's compensation laws.

The court of appeals recognized this fact in its initial opinion but concluded on remand that the geographical component of the phrase "maritime employment" had been abandoned by this Court in *P. C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69 (1979). Under what it perceived to be the compulsion of *Ford*, the court of appeals ruled that even a person whose principal duties are performed on navigable waters is nevertheless not necessarily "engaged in maritime employment" under Section 2(3) of the amended Act. *Ford* does not support that proposition, and nothing in this Court's opinion was intended to withdraw from the category of maritime employees any persons who spend the bulk of their working day working on actual navigable waters.

The claimants in *Ford* were not such workers. Their work was not performed on actual navigable waters. Indeed, the question before the Court in *Ford* was whether land-based cargo handlers could be "engaged in maritime employment," and therefore covered under the Act, even if they were not subject to assignment aboard a vessel in the course of their working day. The question, in short, was whether workers could be engaged in maritime employment

even if they never worked on actual navigable waters. In this context, the Court emphasized that the phrase "maritime employment," as used in Section 2(3), has an occupational content and does not focus exclusively on the locus of a person's workday activities. 444 U.S. at 78-81. The Court therefore held that two marine terminal workers engaged in the process of transferring cargo between sea and land transportation were engaged in maritime employment by the very nature of their work, even if they were never required to perform any tasks on actual navigable waters. The Court reached this result in part because Congress specified in Section 2(3) that the phrase "person engaged in maritime employment" includes "any longshoreman or other person engaged in longshoring operations * * *."

The Court never suggested, however, that the location of a person's work is irrelevant to the question whether he is "engaged in maritime employment" or that a person who routinely performs duties on actual navigable waters is not "engaged in maritime employment" unless his work "bear[s] a significant relationship to navigation or to commerce on navigable waters." The Court in *Ford* had no occasion to address such matters because they were not germane to the claimants whose coverage under the Act was then in dispute.

The fact is that the phrase "maritime employment," as used in Section 2(3), has *both* an occupational and a geographic content. The court's decision in *Ford* was not intended to exclude the latter in favor of the former. By requiring a "significant relationship to navigation or to commerce on navigable waters" as a precondition to coverage under the Act, even for employees whose principal duties are per-

formed on actual navigable waters, the court of appeals has adopted a test that in many instances will re-create the very problem the LHWCA was initially intended to solve, *i.e.*, the potential unavailability of *any* compensation remedy for persons injured on the navigable waters of the United States.

We regard this error in the court of appeals' decision as an important one and believe that intervention by this Court may well be necessary to rectify it. For two reasons, however, we think that review is not warranted in the present case. In the first place, no conflict has yet arisen among the circuits concerning the maritime employment question here presented. We have been advised by the Department of Labor that numerous cases involving marine construction workers are currently being litigated before the Benefits Review Board and in the several deep-water circuits. In part because of the significant factual variation that inevitably characterizes cases under the Act, it seems prudent at this juncture to await further developments in the courts of appeals. Such a course will not only permit this Court to have the benefit of additional views on the question of the proper geographic scope of Section 2(3), but it will also assist the Court in selecting a typical case for review.

Deferral of review seems particularly appropriate in the present circumstances because the interpretation of "maritime employment" described in the preceding paragraphs was apparently not briefed or argued by any of the parties before it was adopted by the court of appeals in its initial opinion in this case. (That opinion was flawed, however, by its insistence that "maritime employment" under Section 2(3) can *only* be understood in a geographical

sense.) On remand, the parties filed supplemental briefs that alluded to the rationale of the court's initial decision but did not separately develop the view that a person who regularly performs duties on navigable waters is, by virtue of that fact alone, engaged in maritime employment. Although a reasonably prompt, definitive resolution of the question is desirable, we believe the Court's consideration of the matter will be aided by a court of appeals' decision rendered after briefing and argument that focuses separately on the significance of the place where the bulk of an employee's duties are performed, on the one hand, and the place where he is injured, on the other.

2. The second deficiency in the court of appeals' decision on remand is its unexplained dismissal of the nature of the project on which petitioners were working as a factor in determining whether they were engaged in maritime employment at the time of their injuries. The court offered only the following conclusory statement (Pet. App. A-5): "It is not significant that the [sewage disposal] plant was being constructed so that sewage would not cause pollution of navigable waters * * *." The court did not say why the purpose of the project was insignificant, and we believe that the court's assertion to that effect is erroneous.

Even if "maritime employment" under Section 2 (3) requires a "relationship to navigation or to commerce on navigable waters," as the court of appeals held, that relationship is present here because of the nature of the plant that petitioners were helping to build. The primary purpose of the sewage disposal plant was to prevent pollution of the Hudson River and thereby to contribute to navigation and commerce

on that waterway. Whatever may be the correct rule with respect to marine construction workers generally, the court of appeals should have found that petitioners satisfied the status test in Section 2(3).

Although the court of appeals' failure to attribute any significance to the nature of the construction project was error, this aspect of the case is not sufficiently important to merit review by this Court. Marine workers injured in the construction of sewage disposal plants represent only a small percentage of the workers entitled to coverage under the Act, and their number also is not large in absolute terms. The Benefits Review Board and the courts of appeals have agreed that construction workers employed on projects bearing a more conventional relationship to navigation and commerce are covered under the Act. See, *e.g.*, *Stewart* v. *Brown & Root, Inc.*, 7 B.R.B.S. 356 (1978), aff'd, 607 F.2d 1087 (4th Cir. 1979), cert. denied, No. 79-1136 (June 2, 1980). Considered by itself, the propriety of extending this rule to sewage disposal plants is not sufficiently significant to the proper administration of the Act to warrant this Court's intervention.

3. The court of appeals' decision is probably incorrect in a third respect, but certain deficiencies in the record make it difficult or impossible to be sure. It appears likely that petitioners were injured while working on the actual navigable waters of the United States. The court of appeals acknowledged in its initial opinion that, if this were so, petitioners would have been covered under the Act before 1972, solely by virtue of the place at which their injuries occurred and irrespective of the location where their principal duties were performed (Pet. App. A-18 to A-21). The consequence of the court of appeals' de-

cision on remand is that employees who the court apparently assumed would have been covered before 1972 are held not to be covered under the amended Act. In our view, this reflects a misconception of the nature and intent of the 1972 amendments. Congress acted in 1972 to expand the Act's coverage, not to expand it in some areas and contract it in others.

The question whether the 1972 amendments removed coverage under the Act from any employee covered before 1972 is an important one that the Court has already recognized (*Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 265 n.25 (1977)) and that will probably require resolution in this forum. Because the record does not definitively establish petitioners' location at the time of their injuries, however, we believe that the Court should postpone its consideration of the question until a case arises in which there can be no dispute concerning the injured employee's eligibility for benefits under the pre-1972 Act.

Before 1972, the general rule under the Act was that persons injured on the actual navigable waters of the United States were covered and persons injured on land were not. See *Sun Ship, Inc.* v. *Pennsylvania, supra*; *P. C. Pfeiffer Co.* v. *Ford, supra*, 444 U.S. at 72-73; *Nacirema Operating Co.* v. *Johnson*, 396 U.S. 212 (1969); *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114 (1962); *Davis* v. *Department of Labor*, 317 U.S. 249 (1942); *Parker* v. *Motor Boat Sales, Inc.*, 314 U.S. 244, 247 (1941). In particular, marine construction workers were covered, as long as they were injured on navigable waters. This was true regardless of whether the project under construction was intended to aid navigation or commerce on navigable waters. Compare *Travelers*

Insurance Co. v. *Branham*, 136 F.2d 873 (4th Cir. 1943) (labor foreman building dry dock), with *Hardaway Contracting Co.* v. *O'Keeffe*, 414 F.2d 657 (5th Cir. 1968) (laborer building bridge).

The legislative history of the 1972 amendments demonstrates that Congress did not wish to exclude from coverage any employees who are injured on actual navigable waters and therefore would have been covered under the original Act. The amendments to Section 2(3) of the Act, defining "employee," and to Section 3(a), the general coverage provision, were discussed in both the Senate and House committee reports under the heading: "Extension of Coverage to Shoreside Areas." S. Rep. No. 92-1125, 92d Cong., 2d Sess. 12-13 (1972); H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 10-11 (1972). In its section-by-section analysis of the statutory changes, the Senate committee stated:

> [Amended § 2(3)] specifically includes any longshoreman or other person engaged in longshoreing [*sic*] operations, and any harborworker, including a ship repairman, shipbuilder and shipbreaker. *It does not exclude other employees traditionally covered* * * *.

S. Rep. No. 92-1125, *supra*, at 16 (emphasis added).

In its original opinion, the court of appeals acknowledged this clear statement of legislative intent and held that the italicized sentence from the committee report means that employees previously covered by the Act remain covered under the amended version of the statute. In the court's words (Pet. App. A-22; emphasis in original):

> *Congress took it for granted that injuries occurring upon water were covered and would*

remain covered. There was no indication that Congress considered withdrawing existing coverage or eligibility. What concerned Congress was injuries on land.

On remand from this Court, after the decision in *P.C. Pfeiffer Co.* v. *Ford, supra,* however, the court of appeals concluded that the location of an injury, by itself, can no longer be dispositive of the coverage question under the Act. As already discussed (see page 6, *supra*), the court interpreted *Ford* to adopt an exclusively occupational standard for determining whether a particular injured worker is entitled to the Act's benefits. As a consequence, the court held that not all workers injured on the actual navigable waters of the United States remain covered under the amended Act. Congress' revised definition of "employee" in Section 2(3), the court thought, provides coverage only for those workers whose activities "bear a significant relationship to navigation or to commerce on navigable waters" (Pet. App. A-4).

This interpretation of the amended Act by the court of appeals resurrects the distinction, rejected under the original statute in *Calbeck* v. *Travelers Insurance Co., supra,* between jobs of purely local concern and jobs related to navigation and commerce. There is no evidence that Congress intended such a result when it amended the statute in 1972. Nor is this outcome required by the Court's decisions in *Ford* and in *Northeast Marine Terminal Co.* v. *Caputo, supra.* Those cases dealt with employees falling squarely within the area of Congress' special concern in 1972. The employees suffered injuries on land, which before the amendments would not have been covered because of the location of their occurrence. Congress' primary purpose in 1972 was to eliminate the locus of injury as the single coverage-

determining factor for employees engaged in certain occupations. But Congress never said that, for employees whose jobs are not included among the occupations specifically enumerated in Section 2(3), the occurrence of an injury on actual navigable waters is irrelevant to the determination whether the employee was "engaged in maritime employment" when he was injured. On the contrary, Congress did not seek to change this aspect of pre-1972 law, and the Court in *Caputo* explicitly emphasized that that case did not "involve the question whether Congress excluded people who would have been covered before the 1972 Amendments; that is, workers who are injured on navigable waters as previously defined." 432 U.S. at 265 n.25.

The erroneous reasoning adopted by the court of appeals and the Benefits Review Board in this case is causing substantial difficulties and uncertainty in marine construction coverage cases now coming before the Board. In reliance on the Board's decision here, coverage has been denied in cases involving commercial divers constructing underwater sewer pipelines,[4] a dredge deckhand on an airport reef runway construction project,[5] a bridge construction worker unloading pilings from a barge,[6] and a num-

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[4] *Hobbs* v. *Healy Tibbits Construction Co.*, Case No. 78-LHCA-1040-S, OWCP No. 15-15067 (Mar. 5, 1980), appeals docketed, BRB Nos. 80-390 and 80-390A; *Brown* v. *Hydro-Dredge Corp.*, Case No. 79-LHCA-1162, OWCP No. 1-31154 (Nov. 20, 1979), appeals docketed, BRB Nos. 79-721 and 79-721A.

[5] *Ramos* v. *Universal Dredging Corp.*, 10 B.R.B.S. 368 (1979), appeals docketed, Nos. 79-7257, 79-7258 and 79-7302 (9th Cir. June 25 and July 2, 1979).

[6] *Gilliam* v. *Wiley N. Jackson Co.*, 12 B.R.B.S. 556 (1980), appeal docketed, No. 80-5804 (5th Cir. Oct. 9, 1980).

ber of other workers injured on navigable waters who would have been covered before 1972. Accordingly, the Director regards review by this Court as essential in the first suitable case. For the following reasons, however, we do not believe that this case is an appropriate one in which to attempt to resolve the important legal question.

Before 1972, coverage determinations under the Act focused on one principal question: did the injury occur on the navigable waters of the United States within the meaning of the statute. The courts developed a considerable body of law concerning the areas that were deemed to be navigable waters for purposes of the Act. It was well-settled at the time the piers and docks and other structures permanently affixed to the land were not considered to be navigable waters, even if they in fact extended far into the water. See *Nacirema Operating Co.* v. *Johnson, supra,* 396 U.S. at 214-215.

The problem in the present case is that the record does not sufficiently establish that either Fusco or Sullivan would have been covered under the pre-1972 Act. In both cases, there appears to be some possibility that the injury occurred on a part of the concrete substructure for the sewage treatment plant that was already permanently affixed to the land. In Fusco's case, the administrative law judge indicated that the ladder on which the claimant was injured led "from one of the concrete forms down to a raft below" (Pet. App. A-89). On this basis, pre-1972 coverage would seem fairly clear, assuming the raft was floating in the water. The ladder was not permanently affixed to the land, and the injury took place over water. But Fusco himself now says (80-651 Pet. 13-14) that the ladder extended from the

top of the grillage above the concrete forms down into a particular form. This suggests the possibility that the claimant was injured at a place permanently affixed to the land, a place that would therefore not qualify as navigable waters under pre-1972 law.[7]

As for Sullivan, the record is even less enlightening. As the court of appeals accurately observed in its initial opinion (Pet. App. A-15), the record does not reveal exactly where Sullivan was standing when he was injured. The court of appeals bypassed this possible problem by simply stating: "We therefore cannot suppose that at the time of the accident, while installing beams hanging over water, Sullivan was standing on a structure permanently affixed to land" (*id.* at A-16). The difficulty, of course, is that there also does not seem to be any particular reason for supposing that Sullivan was not standing on such a structure.[8]

In light of the apparent inadequacy of the present record squarely to present the important legal question concerning the effect of the 1972 amendments on pre-1972 coverage, we do not urge the Court to grant these petitions. Especially in view of the abundance of claims filed under this statute, we think it more prudent to await a case that will, with greater certainty, permit resolution of the matter that deserves this Court's attention.

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[7] Fusco's petition also raises a substantial timeliness problem. See Perini Br. in Opp. 3-10.

[8] The Court may wish to vacate the decision below and remand for further fact findings on this point.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1981

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 335937 243

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